UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUAN FLORES, et al., Plaintiffs, v. ALBERTSONS, INC., et al., Defendants.	CASE NO. CV 01-00515 AHM (SHx) ORDER DENYING DEFENDANT ALBERTSON'S, INC.'S MOTION FOR REVIEW AND RECONSIDERATION

INTRODUCTION

This matter is before the Court on Defendant Albertson's, Inc.'s (alternatively, "Defendant" or "Albertson's") Motion for Review and Reconsideration. Defendant seeks review of Magistrate Judge Stephen J. Hillman's ("Magistrate Judge") February 26, 2002 order granting in part and denying in part Defendant's "Motion to Compel Production of Documents from Plaintiffs Guadalupe Flores and Armando Jimenez." Because the Court finds Defendant has not met the burden for a Motion for Review and Reconsideration, the Court DENIES Defendant's motion.

BACKGROUND

This case is a class action brought by eight janitors against Albertson's, Ralphs, Vons and Safeway ("Supermarket Defendants"), and the entities with whom they contract for janitorial services, Encompass Services Corporation

("Encompass") and Building One Service Solutions, Inc. ("BOSS"). The class of Plaintiffs is defined as follows:

> All individuals who, at any point in time since January 1, 1994, have performed janitorial services in California for Albertson's, Inc., Ralphs Grocery Company, The Vons Companies, Inc., and any other California supermarket whose owners and operators have contracted with defendants Encompass Services Corporation, and/or Building One Service Solutions, Inc.,...for the provision of said services.

Plaintiffs allege that beginning in approximately 1994 the Supermarket Defendants entered into agreements with Defendants Encompass and its subsidiary or predecessor in interest, BOSS, whereby those entities were to provide janitorial services for stores operated by the Supermarket Defendants. (First Amended Complaint ("FAC") ¶ 2). Thereafter, Encompass allegedly conspired with recruiters who engaged the plaintiffs to work for the Supermarket Defendants. (*Id*.). In connection with this work, Plaintiffs allege they were unlawfully treated as mere independent contractors and that such classification resulted in Defendants failing to pay Plaintiffs overtime premiums and other wages to which they were entitled. (*Id*.). To remedy this failure, Plaintiffs assert the following claims:

(1) Failure to Pay Overtime Compensation and Other Wages in Violation of the Fair Labor Standards Act (FLSA)

(2) Failure to Pay Overtime Compensation and Other Wages in Violation of the California Labor Code

(3) Breach of Written Contract Against Encompass

(4) Negligence Per Se

(5) Negligent Training and/or Supervision Against Albertson's, Ralphs and Vons

(6) Negligent Hiring and Retention

(7) Fraud

(8) Unfair Business Practices

(9) Unlawful and Unfair Business Practices Against the Supermarket Defendants

Other than the exceptions noted, each claim is pled against all defendants.

In connection with its defense of this action, Defendant propounded the following document requests to the plaintiffs. (Jt. Stip, Ex. B at 95-97).

DOCUMENT REQUEST NO. 17:

> Each and every DOCUMENT describing, reflecting, referring to or relation to the amount of [Plaintiff] FLORES'S income, whether earned or passive, from January 1, 1994, to the present, including but not limited to bank account statements, brokerage account statements, bank deposit receipts, and W-2 or 1099 forms.

DOCUMENT REQUEST NO. 18:

> FLORES'S personal income tax returns which were filed with the State of California or the International [sic] Revenue Service for the tax years 1996 and 1997 and 1998 and 1999 and 2000.

DOCUMENT REQUEST NO. 20:

> Each and every DOCUMENT describing, reflecting, referring to or relating to the immigration status of FLORES, including but not limited to I-9 forms.

Plaintiffs objected to each of the above requests on various grounds. Thereafter, Defendant filed a Motion to Compel. The Magistrate Judge conducted a court hearing on Defendant's motion on January 23, 2002 and a second telephonic hearing on February 4, 2002. On February 26, 2002, the Magistrate Judge issued an order granting in part and denying in part Defendant's

motion. With respect to Document Requests 17 and 18, the Magistrate Judge ordered the named plaintiffs to produce all responsive W-2 and 1099 Forms from Defendant BOSS or a BOSS subcontractor within 30 days. Defendants withdrew their requests for bank and brokerage records. However, the Magistrate Judge denied Defendant's request for additional documents, implicitly including Plaintiffs' tax return information. As to Document Request 20, the Magistrate Judge denied Defendant's motion in its entirety.

Defendant seeks review of the Magistrate Judge's order denying its Motion to Compel as to Document Requests 18 and 20. Specifically, Defendant asks this Court to vacate or modify the February 26, 2002 order so that Plaintiffs are required to produce their income tax returns and documents establishing their right to work in the United States. (Def.'s Notice of Mot. at 1).

DISCUSSION

I. STANDARD OF REVIEW

28 U.S.C. § 636(b)(1)(A) allows a district judge to designate a magistrate judge to hear certain pretrial matters. The district judge may reconsider any such pretrial matter "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Central District Magistrate Rule 3.3.1 also governs the Court's review of the magistrate's order. Rule 3.3.1 provides:

> Within ten (10) days of service upon him of a written ruling, or order on a pretrial matter not dispositive of a claim or defense, any party aggrieved by a Magistrate Judge's decision may file (original and two copies) and serve a motion for review and reconsideration before the District Judge to whom the case is assigned, specifically designating the portions of the decision objected to and specifying wherein such portions of the decision are clearly erroneous or contrary to law, with points and authorities in support thereof.

Central District Magistrate Rule 3.3.1. "Discovery rulings by a Magistrate Judge are reviewed by this court under the implicit standard of abuse of discretion." *In*

re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England, 147 F.R.D. 223, 225 (C.D. Cal. 1993) (citing *Geophysical Systems Corp. v. Raytheon Co.*, 117 F.R.D. 646, (C.D. Cal. 1987)). "[I]n deciding whether an abuse of discretion has occurred, this court will only consider the evidence that was presented to the Magistrate Judge." *Id.* at 226. The district court assigned to the case "shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." FED. R. CIV. P. 72(a).

II. THE MAGISTRATE JUDGE'S REFUSAL TO COMPEL THE PRODUCTION OF PLAINTIFFS' TAX RETURNS WAS NOT CLEARLY ERRONEOUS.

As stated *supra*, the Magistrate Judge ordered the named Plaintiffs to produce all W-2 and 1099 Forms from Defendant BOSS or its Subcontractors. (February 26, 2002 Order at 2:24 - 3:1). However, the Magistrate Judge refused to compel the production of Plaintiffs' tax returns. (Id. at 3:1-2). In so doing, the Magistrate Judge found that there was little relevant information in the tax returns and that there was an *in terrorem* effect to ordering their production. (Cephas Decl., Ex. A at 18).[1] In addition, the Magistrate Judge stated that there was a better way to obtain the information Defendant sought, although he did not articulate this alternative method. (*Id*.).[2] The Magistrate Judge indicated that his

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[1] Although the Magistrate Judge's February 26, 2002 Order does not articulate the reasoning for his decision, the Magistrate Judge did reveal the bases for his ruling during the February 4, 2002 telephonic hearing on Defendant's Motion to Compel.

[2] Defendant argues at length that the alternate method of discovery referenced by the Magistrate Judge would require Defendant to obtain the information regarding Plaintiffs' income from the Subcontractors. (Mot. at 11-13). However, there is no indication in the transcript that the Magistrate Judge was referring to this method.

decision was without prejudice to Defendants making a greater showing of the need for the tax returns at a later stage of the litigation. (Id. at 20).[3]

Defendant contends the Magistrate Judge's failure to compel the production of Plaintiffs' tax returns was clearly erroneous and contrary to law. Specifically, Defendant argues Plaintiffs should be compelled to produce their tax returns and related records for the following reasons: (1) Plaintiffs have put their income and method of payment at issue; (2) Plaintiffs have not met the necessary burden to require Defendant to obtain the information from the Subcontractors or another source; and (3) requiring the defendant to obtain such information from the Subcontractors would be unduly burdensome and apparently futile. (Mot. at 7-13). In opposition, Plaintiffs do not dispute that the tax returns have some relevance to this suit. (Opp'n. at 8:15). However, Plaintiffs contend that most of the information sought by Defendant is available in the W-2 and 1099 Forms and that compelling the production of Plaintiffs' tax returns will unduly infringe on the privacy rights of the plaintiffs. (Opp'n. at 8).

There is no question that Plaintiffs' tax returns have at least some relevance to this action because the plaintiffs have placed their income in question. *(*FAC ¶ 2); *Shaver v. Yacht Outward Bound*, 71 F.R.D. 561, 563 (N.D. Ill. 1975) ("As a general rule, federal income tax returns are subject to discovery in civil suits where a litigant tenders an issue as to the amount of his income."). However, the Magistrate Judge's refusal to compel production is nonetheless proper if Plaintiffs met the burden of proving there was no compelling need for the tax returns

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[3] Although not entirely clear from the record, the Magistrate Judge apparently decided that all relevant information sought by the defendant could be found in the W-2 or 1099 Forms. In response, Defendant argued this was not sufficient because many plaintiffs stated that they did not receive W-2 Forms. (Cephas Decl., Ex. A at 19: 4-17). Thus, the Magistrate Judge evidently made his ruling without prejudice so as to be able to revisit the issue upon a greater showing that the W-2 Forms had not been produced.

because the information sought could be obtained from other sources. *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 80 (E.D. Penn. 1994). Here, the Magistrate Judge implicitly found Plaintiffs had met that burden. The Court does not find this ruling to be clearly erroneous.

The Magistrate Judge's February 26, 2002 order compelled Plaintiffs to produce their W-2 and 1099 Forms. These documents would, presumably, contain all necessary information regarding Plaintiffs' income from BOSS or its Subcontractors. Perhaps acknowledging this fact, Defendant argues the tax returns are nonetheless necessary because many plaintiffs have indicated they did not receive W-2 Forms and, even if such forms are produced, those forms would not reveal whether the plaintiffs were paid, as they allege, as independent contractors. (Reply at 5, 6).[4] At this stage of the litigation, the Court finds both arguments insufficient to warrant reversal of the Magistrate Judge's ruling.

In support of its claim that many plaintiffs lack W-2 Forms, Defendant points to the declarations of two named plaintiffs, who indicate that sometimes they were not given a statement of their hours and wages. (Cephas Reply Decl., Ex. B, ¶ 2, Ex. C, ¶ 2). Even if, as Defendant argues, those individuals were not given W-2 or 1099 Forms, it would have been entirely speculative for the Magistrate Judge to assume that every named plaintiff or class member also lacks such information. Rather, given the record before the Magistrate Judge, he had no reason to believe the information regarding Plaintiffs' incomes would not be made available by his order compelling the production of Plaintiffs' W-2 and 1099 Forms. In fact, to accommodate Defendant's concern, the Magistrate Judge made his ruling without prejudice to Defendant making a greater showing of the

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[4] Defendant also argues the tax returns would establish whether Plaintiffs worked for one of BOSS's Subcontractors. (Mot. at 10). However, such information would also be present in Plaintiffs' W-2 Forms and thus the tax returns add nothing in this respect.

need for Plaintiffs' tax returns at a later juncture. (Cephas Decl., Ex. A at 20). Given the record before the Magistrate Judge, the Court is unable to find this choice was "clearly erroneous."

As to Defendant's second argument – that only tax returns will indicate whether Plaintiffs were paid as "independent contractors" – the Court also finds this insufficient to warrant reversal. Defendants argue Plaintiffs' tax returns are necessary because a 1099 Form will reveal only the amount each plaintiff was paid, whereas a tax return for an independent contractor ordinarily will contain a Schedule C ("Profit or Loss From Business") revealing whether the taxpayer operated as a second level subcontractor who hired individuals to work in Defendant's stores. (Reply at 6). Even assuming Plaintiffs' tax returns would contain such information, the notion that Plaintiffs operated as second level subcontractors is far fetched. Plaintiffs do allege they were treated as "independent contractors." (FAC ¶ 2). However, that allegation is coupled with allegations and (on this motion) declarations tending to demonstrate that in fact Plaintiffs were treated as "employees."[5] Moreover, as Plaintiffs argue, even assuming some Plaintiffs may have functioned as second level subcontractors who hired others to work in Defendants' stores, Defendant could easily obtain this information by propounding interrogatories to the named plaintiffs on this issue. As such, Plaintiffs' tax returns are not relevant for this purpose and Defendant's argument is rejected.

For the foregoing reasons, the Court is unable to find that the Magistrate Judge's refusal to compel the production of Plaintiffs' tax returns was "clearly erroneous." The Magistrate Judge was well within his discretion in deciding that the relevant information sought from Plaintiffs' tax returns could be obtained from Plaintiffs' W-2 and 1099 Forms or from the Subcontractors. If that

[5] In fact, the FAC clearly alleges that each of the named plaintiffs "worked" as janitors at Defendants' stores. (FAC ¶¶ 2:20, 26, 27, 28, 29, 30, 31, 32, 33).

ultimately proves to be incorrect, Defendant may file another Motion to Compel with the Magistrate Judge.

III. PLAINTIFFS' IMMIGRATION DOCUMENTS ARE NOT RELEVANT TO THIS ACTION AND THEIR COMPELLED PRODUCTION COULD CAUSE A MISCARRIAGE OF JUSTICE.

As stated *supra*, the Magistrate Judge denied Defendant's Motion to Compel Production of Documents related to the immigration status of the plaintiffs.[6] In so doing, the Magistrate Judge found that there was an *in terrorem* effect to the production of such documents and that the immigration status of Plaintiffs was not relevant to any claim or defense. (Cephas Decl., Ex. A at 21, 29). The Magistrate Judge specifically rejected Defendant's contention that this information could somehow mitigate Albertson's liability. (Cephas Decl., Ex. A at 21).[7] In addition, the Magistrate Judge noted that Defendant could obtain such information from the subcontractors who directly employed the plaintiffs through the contractual obligations those subcontractors owe to BOSS. (Cephas Decl., Ex. A at 27, 34).

Federal courts are clear that the protections of the FLSA are available to citizens and undocumented workers alike. *Patel v. Quality Inn South*, 846 F. 2d 700, 706 (11th Cir. 1988); *Contreras v. Corinthian Insur. Brokerage*, 25 F. Supp. 2d b1053, 1056 (N.D. Cal. 1998).[8] Nonetheless, Defendant argues that

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[6] Document Request 20 expressly sought only the immigration documents of Plaintiff Flores. However, as the transcript of the February 4, 2002 hearing makes clear, the Magistrate Judge denied Defendant's Motion to Compel such documents as to all class members. (Cephas Decl., Ex. A at 21).

[7] The parties and the Magistrate Judge used "mitigate damages" to refer to what this Court believes should be termed "reduce the amount of damages it might have to pay."

[8] Plaintiffs have acknowledged that many class members may be undocumented workers. (Jt. Stip. at 24:24-27).

documents related to Plaintiffs' immigration status are relevant to this action because such information may limit Defendant's liability for back pay. (Mot. at 13; Reply at 8). In support of this assertion, Defendant relies on *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 2002 WL 459438 (U.S. S. Ct.) and *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-63, 115 S. Ct 879, 886-87 (1995).

In *Hoffman*, the Supreme Court addressed an award of back pay to an undocumented worker who had been unlawfully terminated due to his participation in a union-organizing campaign. *Id*. at *3. The Court held that an award of back pay to an illegal alien for years of work "not performed" ran counter to the policies underlying the Immigration Reform and Control Act (IRCA) of 1986. *Id*. at *8. As such, the Court held, the award was not permissible. *Id*. at *9.

Hoffman does not support Defendant's argument that Plaintiffs' immigration status is relevant to this action. Here, unlike in *Hoffman*, the class members have not been terminated and do not seek back pay for work "not performed." Rather, Plaintiffs continue to be employed as janitors in stores operated by the defendant and merely seek to recover the unpaid wages (minimum wages and overtime premiums) to which they are entitled under the FLSA. *Hoffman* did not hold that an undocumented employee was barred from recovering unpaid wages for work actually performed. In fact, as the majority opinion makes clear, the Court was concerned with the inability of the undocumented worker to mitigate damages after his termination, a duty required under federal law. *Id*. at *8. Here, Plaintiffs are under no duty to mitigate damages because they have not been terminated.[9] Thus, *Hoffman* does not establish that an award of unpaid wages to undocumented workers for work

[9] The Magistrate Judge recognized this fact during the telephonic hearing. Cephas Decl., Ex. A at 29:14-18).

actually performed runs counter to IRCA. As such, the case does not support Defendant's argument that Plaintiffs' immigration status is relevant to its defense in this case.[10]

For analogous reasons, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-63, 115 S. Ct 879, 886-87 (1995), does not establish that Plaintiffs' immigration status is relevant to this action. In *McKennon*, the Supreme Court held that after-acquired evidence of wrongdoing by a wrongfully terminated employee could limit the amount of back pay awarded the employee-plaintiff. *McKennon*, 513 U.S. at 362-63. As with *Hoffman*, the Supreme Court in *McKennon* addressed an award of back pay to a plaintiff who had been wrongfully terminated by his or her employer. The case does not hold that an employee who seeks to recover unpaid wages for work actually and previously performed cannot do so. As such, it also does not establish that Plaintiffs' immigration status is relevant to this action.

Moreover, as the Magistrate Judge found, there is an *in terrorem* effect to the production of such documents. It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation. In fact, this fear is entirely reasonable given Defendant's acknowledgment that it seeks this information so that it can preclude undocumented members of the class from performing janitorial services

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[10] In *Del Rey Tortilleria, Inc. v. NLRB*, 976 F. 2d 1115 (7th Cir. 1992), the Seventh Circuit drew a similar distinction between back pay for labor "not performed" and unpaid wages for work "actually performed." In *Del Rey Tortilleria*, the Seventh Circuit anticipated *Hoffman* in holding that undocumented workers could not receive back pay for wages they would have earned had they not been terminated. *Id*. at 1121. However, in so doing, the Seventh Circuit expressly distinguished *Patel v. Quality Inn South*, 846 F. 2d 700 (11th Cir. 1988), *supra*, on the basis that *Patel* involved a suit by undocumented workers for work "already performed. *Del Rey Tortilleria*, 976 F. 2d at 1122 fn. 7.

in its stores. (Mot. at 14:11-14). Federal courts have held that where, as here, the disclosure of the requested information may cause injury to a party, the party seeking discovery must demonstrate that its need for the information outweighs the injuries that may be caused by disclosure. *Flynn v. Goldman, Sachs & Co.*, 1993 WL 362380 (S.D.N.Y.). Thus, even assuming Plaintiffs' immigration status is somewhat relevant to Defendant's damages (an assumption belied by the case law), Defendant must still establish that its need for the information outweighs the injuries that may be caused by disclosure. Given the significance of the potential harm, Defendant has failed to meet this burden.

For the foregoing reasons, the Court cannot say that the Magistrate Judge's ruling as to Plaintiffs' immigration documents was clearly erroneous or contrary to law. As such, Defendant's motion is denied.

CONCLUSION

For the foregoing reasons, and good cause appearing therefor, the Court DENIES Defendant's Motion for Review and Reconsideration.[11]

IT IS SO ORDERED.

DATE: April _____, 2002

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A. Howard Matz
United States District Judge

[11] Docket No. 101.